

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh, and Remy

**From:** Brian G. Lau, Commission Counsel  
Scott Hallabrin, General Counsel

**Subject:** Prenotice Discussion of Proposed Regulation 18420.1 – Expenditures by  
Governmental Agencies for Communications Related to a Ballot Measure.

**Date:** August 21, 2008

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Proposed Commission Action and Staff Recommendation: Approve publication of notice for adoption of proposed Regulation 18420.1 in November.

Reason for Proposal: The Political Reform Act (the “Act”) defines the term “expenditure” as “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for a political purpose.” (Section 82025.) In other words, an expenditure includes “any payment made for a political purpose.” (Regulation 18225.)

The term “independent expenditure” is defined as “an expenditure made by any person in connection with a communication which expressly advocates<sup>1</sup> the election or defeat of a clearly identified candidate or measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest<sup>2</sup> of the candidate or committee.” (Section 82031.) Thus, an independent expenditure is a more specific type of expenditure, and a subset of expenditures generally.

Despite the definitions given for expenditure and independent expenditure in the Act, a recent decision by the Sixth District Court of Appeal of California misconstrues Regulation 18225 by finding that the Commission “defines expenditure as any payment ‘used for communications which *expressly advocates* ... the qualification, passage or defeat of a clearly identified ballot measure.’” (*Vargas v. City of Salinas* (2005) 135 Cal App. 4<sup>th</sup> 361, 383, review granted April 26, 2006, S140911, emphasis in original.)

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<sup>1</sup> “A communication ‘expressly advocates’ the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot,’ ‘vote against,’ ‘defeat,’ ‘reject,’ ‘sign petitions for’ or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.” (Regulation 18225(b)(2).)

<sup>2</sup> Regulation 18225.7 defines the phrase “made at the behest of” as a payment “made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of.”

While an independent expenditure requires express advocacy under the Act, neither the plain language of the Act nor the Commission defines an expenditure to require express advocacy. Moreover, Regulation 18225 provides only that the term expenditure *includes* payments “used for communications which expressly advocates ... the qualification, passage or defeat of a clearly identified ballot measure.” Nothing in Regulation 18225 necessarily precludes payments made for communications not expressly advocating the qualification, passage or defeat of a ballot measure from the statutory definition of the term expenditure.

The court’s misinterpretation of Regulation 18225 in the *Vargas* decision has had two significant consequences. First, Government Code Section 8314, a provision outside the Act, prohibits elected state or local officers, including any state or local appointee, employee, or consultant, from using or permitting others to use public resources for campaign activity. As defined in Section 8314(a)(2), “campaign activity” is any activity constituting a contribution or expenditure as defined by Sections 82015 and 82025 of the Act. Because the Sixth District Court of Appeal has stated that a communication is not an expenditure unless the communication contains express advocacy, it now appears that governmental agencies do not run afoul of Section 8314 so long as they avoid express advocacy.<sup>3</sup>

Consequently, many agencies are pushing the limits with public outreach programs clearly biased or slanted in their presentation of facts relating to a ballot measure supported or opposed by the agency. In one recent, and more extreme, example a local agency placed an advertisement in 18 publications denouncing a ballot measure that would diminish the agency’s planning powers. While avoiding express advocacy, the advertisement stated (1) that the agency wanted to “set the record straight by letting you know of its unanimous and adamant opposition” to the measure, (2) that the measure was “vague and unclear,” (3) that the measure would “severely impair” the agency’s function, (4) that the measure rested on a “false premise,” and (5) that the measure “threatens” regional jobs. Finally, the advertisement closed by reminding voters to “carefully consider” the agency’s “educational message” before “casting a ballot.”

Currently, the California Supreme Court has granted review and superseded the Sixth District Court of Appeal’s decision in *Vargas*. While the final outcome of this review and the court’s ultimate determination of the permissible use of public moneys for campaign activities remains unclear, clarifying the Commission’s interpretation of Section 82025 provided in Regulation 18225 should, at a minimum, prevent the court from citing Regulation 18225 to support a conclusion that a payment qualifies as an expenditure under Section 82025 of the Act only if the communication contains express advocacy.

Second, the misinterpretation of Regulation 18225 by the court in *Vargas* may also lead to confusion in applying the Act’s disclosure provisions as currently interpreted. (Section 84100, *et seq.*) As addressed above, the term expenditure encompasses all payments for a political

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<sup>3</sup> The California Supreme Court previously distinguished between the appropriate use of public moneys to provide the public a fair and impartial presentation of facts relating to a ballot measure and the unlawful use of public moneys by a governmental agency to take sides in a ballot measure campaign. (*Stanson v. Mott* (1976) 17 Cal.3d 206.) The “fair and impartial” standard is incorporated in subdivision (d) of Section 8314.

purpose. Under the Act's disclosure provisions, a committee<sup>4</sup> filing a required campaign statement must provide "[t]he total amount of expenditures made during the period covered by the campaign statement and the total cumulative amount of expenditures made." (Section 84211(b).) Additionally, Regulation 18420 expressly requires a governmental agency making expenditures or contributions to file campaign statements under Chapter 4 of the Act if the agency qualifies as a committee. Thus, a governmental agency qualifying as a committee must report payments made by the committee for a political purpose even if the payment is for a communication that does not contain express advocacy.

In light of the court's interpretation of Regulation 18225 in *Vargas*, staff thinks it is necessary to clarify that a governmental agency making a payment for a communication for a political purpose has made an expenditure as interpreted by the Commission even if the communication does not contain express advocacy. Moreover, this expenditure must be reported on any required campaign statement if the governmental agency qualifies as a committee under Section 82013.

Summary of Proposed Actions: Staff is recommending language to clarify that a payment of public moneys by a governmental agency for a communication relating to a ballot measure shall be considered an expenditure, or in other words a payment made for a political purpose, unless the communication provides a fair and impartial presentation of facts, as provided in case law and Section 8314 (see Footnote 3 above).

Staff further recommends language to define when a "communication relates to a ballot measure." As proposed, the draft language provides that a communication relates to a ballot measure if it clearly identifies a measure as defined in Regulation 18225(b)(1)(C) or (D)<sup>5</sup> or, if taken as a whole and in context, unambiguously refers to the subject matter of an anticipated measure that may be placed on the ballot by the governmental agency.

#### **Attachments:**

#### **1 – Proposed Regulation 18420.1**

#### **2 – Government Code Section 82025**

#### **3 – Regulation 18225**

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<sup>4</sup> Section 82013 defines "committee" as any person or combination of persons who, in a calendar year, directly or indirectly receives contributions totaling \$1,000 or more, makes independent expenditures totaling \$1,000 or more, or makes contributions totaling \$10,000 or more to or at the behest of candidates or committees.

<sup>5</sup> In pertinent part, Regulation 18225(b)(1) provides:

"(C) A measure that has qualified to be placed on the ballot is clearly identified if the communication states a proposition number, official title or popular name associated with the measure. In addition, the measure is clearly identified if the communication refers to the subject matter of the measure and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

"(D) A measure that has not qualified to be placed on the ballot is clearly identified if the communication refers to the subject matter of the measure and to the qualification drive."